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In The

Supreme Court of the United States

October Term, 1992

TIMOTHY JANSEN, DANIEL K. GOENS, ROBERT H. PRASSE, EVAN WOOD, and MARC E. MONAHAN;

and

WILLIAM NEAL, BRIAN CLEMENS, FRANK GORRASI, GREGORY HISSETT, and PHILIP S. RAMSTETTER;

and

DANIEL R. CORRY, NOAH H. GIBBS IV, TIMOTHY B. BURWICK, LAWRENCE D. CAPPEL, ROBERT HART, JEFFREY H. SWEET, MARK E. KREIMER, NICHOLAS SCHIBI, and TIMOTHY A. CUNNINGHAM,

Petitioners,

vs.

CITY OF CINCINNATI, SCOTT JOHNSON, CIVIL SERVICE COMMISSION, WILLIAM MILLER, and NORMAN WELLS;

and

TILFORD YOUNGBLOOD, RALPH NICHOLS,

and

THE PLAINTIFF CLASS CONSISTING OF BLACK APPLICANTS FOR AND BLACK EMPLOYEES OF THE DIVISION OF FIRE OF THE CITY OF CINCINNATI,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Absent some showing of the present effect of past discrimination, may a city constitutionally employ racial quotas to set aside a predetermined number of positions in a fire division recruit class for African-American applicants, notwithstanding the fact that by virtue of this quota, non-minority applicants are denied positions in the recruit class solely because of their race?

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners request that a Writ of Certiorari be issued to review the decision and Judgment of the United States

Court of Appeals for the Sixth Circuit entered on October 13, 1992. This decision vacated a decision and Order of the United States District Court for the Southern District of Ohio, Western Division, terminating certain hiring practices of the City of Cincinnati Fire Division which had been undertaken pursuant to a Consent Decree entered in 1974. On December 29, 1992, the Sixth Circuit denied Petitioners' Suggestion for a Rehearing and Rehearing *En Banc*.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Ohio, Western District, is contained in the Appendix at App. 1, and is unreported. It is cited as *Jansen v. City of Cincinnati*, No. C-1-89-079, C-1-89-479 and C-1-90-151 (S.D. Ohio, March 18, 1991).

The opinion of the United States Court of Appeals is contained in the Appendix at App. 13 and is reported as *Jansen v. City of Cincinnati*, 977 F.2d 238 (6th Cir. 1992). Petitioners were notified by letter from the Clerk of the United States Court of Appeals for the Sixth Circuit that Petitioners' Suggestion for a Rehearing and Rehearing *En Banc* was denied.

JURISDICTION

The final judgment of the Court of Appeals is reflected in its denial of Petitioners' Suggestion for a Rehearing and Rehearing *En Banc*, which was entered on

December 29, 1992. Jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit in this cause, by a writ of certiorari, is conferred on this Court by 18 U.S.C. § 1254(1) (1992).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(See Appendix for verbatim recitation)

1. Fourteenth Amendment to the United States Constitution.

2. 42 U.S.C. § 1983 (1992) – Civil Action for Deprivation of Rights.

3. Ohio Rev. Code Ann. § 124.26 (Baldwin 1992) – Eligible lists; veteran's preference; existing employees who pass examination.

4. Ohio Rev. Code Ann. § 124.27 (Baldwin 1992) – Appointments; certified and provisional; probationary period.

5. Ohio Rev. Code Ann. § 124.90 (Baldwin 1992) – Waiver of laws to avoid federally prohibited discrimination.

STATEMENT OF THE CASE

Petitioners Timothy Jansen, Daniel K. Goens, Robert H. Prasse, Evan Wood and Marc E. Monahan (hereinafter the "Jansen Petitioners") filed their original Complaint in the United States District Court for the Southern District

of Ohio, Western Division, on February 2, 1989. Petitioners William Neal, Brian Clemens, Frank Gorrasi, Gregory Hissett, and Philip S. Ramstetter (hereinafter the "Neal Petitioners") filed their original Complaint in the United States District Court for the Southern District of Ohio, Western Division, on July 5, 1989. Petitioners Daniel R. Corry, Noah H. Gibbs IV, Timothy B. Burwick, Lawrence D. Cappel, Robert Hart, Jeffrey H. Sweet, Mark E. Kreimer, Nicholas Schibi, and Timothy A. Cunningham (hereinafter the "Corry Petitioners") filed their original Complaint in the United States District Court for the Southern District of Ohio, Western Division, on February 23, 1990.[1]

Respondent City of Cincinnati (hereinafter the "City") has, since 1974, segregated test scores from Civil Service examinations given to candidates for hiring, by its Fire Division, into two separate lists: a list of the white applicants and a list of the African-American applicants. The City then hires a predetermined number of applicants from each list into each recruit class. Under this race-conscious, dual-list hiring system various African-American candidates have been hired, even though they received lower tests scores than various white candidates, including Petitioners. (App. 13).

As authority for resorting to this race-conscious, dual-list hiring system, Respondents rely upon a Consent Decree which was entered in 1974 between the City of Cincinnati, the Legal Aid Society, and minority plaintiffs

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[1] Certain of these individuals have withdrawn from this litigation prior to the filing of this petition.

in the case of *Youngblood v. Dalzell*, Civil No. 90-8774 (S.D. Ohio 1974) (App. 31). The *Youngblood* Consent Decree mandated that the City undertake certain affirmative action measures in areas such as advertising, recruiting, screening, and hiring in order to increase levels of black employment in the Fire Division (App. 34-35).

The Consent Decree was entered into in the absence of any showing that the City had discriminated against African-Americans, either in its hiring or promotion practices. No testimony, no direct evidence and no statistical evidence showing that the City selected a disproportionate number of non-minority candidates from a qualified labor pool was ever provided by the City. The Consent Decree does not recite that any individuals have been deprived of any rights. Nor does it state that the City's pre-1974 method of hiring, which was mandated by state law, was in any way discriminatory. In fact, in the Decree the City specifically denied at any time having discriminated against African-American fire recruit candidates. (App. 32.)

The Consent Decree contains timetables and goals for achievement of certain levels of minority employment, both in the Fire Division as a whole, and in each recruit class after 1974.[2] However, the Consent Decree does not

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[2] The Consent Decree set forth interim goals for increasing the overall Fire Division composition of minorities gradually from 4.2 percent (4.2%) by December 31, 1974, to eighteen percent (18%) by December 31, 1980 (App. 41). The City has long since met these goals.

The Decree also provides that the City will be "deemed to have sought to achieve such stage of the work composition *goals*

provide for the race-segregated, dual-list scheme employed by the City over the last eighteen years in order to meet those goals. The City's use of such racial quotas runs contrary to Ohio law which, by virtue of the City of Cincinnati's Charter, is binding on the City of Cincinnati. According to the Ohio Revised Code Annotated § 124.26 (Baldwin 1992) (App. 67), candidates for the Fire Division must be placed on an eligible list "in order of their relative excellence as determined by examination." Furthermore, Ohio Rev. Code Ann. § 124.27 (Baldwin 1992) (App. 68) requires that each vacant position be filled from the eligible list by hiring one of the three candidates highest on the list for each available position.[3]

The *Jansen*, *Neal* and *Corry* Petitioners, all of whom are white, were denied positions in the 1988, 1989 and 1990 recruit classes respectively, by virtue of the race-based quota. Petitioners were unlawfully deprived of their property rights as guaranteed by the Fourteenth Amendment of the United States Constitution (App. 64), as well as Title 42 U.S.C. § 1983 (App. 66), because the

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in good faith if at least forty percent (40%) of the fire recruit class for any given year consisted of minority persons." (App. 41-42) (Emphasis added).

[3] Ohio law mandates a requirement for screening new recruits called "The Rule of Three." This Rule requires that new recruits be hired from one of the three (3) recruit candidates highest on the list. An individual is dropped from the list after having been passed over three (3) times. Since one of the three (3) must be hired, the new recruits are still hired in the general order of excellence. The Rule of Three is *not* an issue in this petition.

City's dual-list scheme worked to exclude them from their respective recruit classes solely on the basis of their race. The *Jansen*, *Neal*, and *Corry* cases were consolidated for trial.

After completion of discovery, the United States District Court considered the matter on Cross Motions for Summary Judgment. The District Court, without reaching the constitutional issues raised by Petitioners, granted Petitioners' Motion for Summary Judgment. The Court ruled that since the City had long since met its goal of eighteen percent (18%) minority composition within the Fire Division, that portion of the *Youngblood* Consent Decree which pertains to the hiring of recruits was no longer operative (App. 12).

Thereafter, Respondents filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit.[4] The parties briefed and argued the issues before the Court. On October 13, 1992, the Court of Appeals issued its opinion in which it vacated the decision of the lower court. (App. 13). The Sixth Circuit addressed Petitioners' constitutional claims and ruled that the use of the race-conscious dual-lists in implementing the Consent Decree's hiring goals did not abridge Petitioners' constitutional rights.[5] (App. 13).

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[4] Petitioners also filed a Notice of Appeal from District Court's failure to grant an appropriate remedy, making Petitioners whole for losses suffered by virtue of their wrongful denial of positions in the 1988, 1989 and 1990 recruit classes.

[5] The 1991 amendments to the Civil Rights Act were not part of this litigation. Even if they had been, the new Amendments would not have altered the outcome in Petitioner's favor.

It is from the Sixth Circuit's decision that this petition for Writ of Certiorari is taken. The Sixth Circuit decision is at odds with this Court's prior rulings that a political subdivision's use of racial classifications deprives one of his or her constitutionally protected property rights under color of state law.[6]

ARGUMENT

I. REASONS FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

Given the historical backdrop of pervasive discrimination by public entities against African-Americans and other minorities, the Supreme Court has traditionally viewed racial classifications adopted by cities, counties, and other political subdivisions as odious and inherently suspect. *See Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

In recent years, as many of these same public entities have implemented various forms of affirmative action to maintain or increase the number of African-Americans in various vocational or commercial endeavors, this Court

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This claim was brought under the Fourteenth Amendment to the Constitution, not under Title VII of the Civil Rights Act. Public employers are held to a higher constitutional standard. *Washington v. Davis*, 426 U.S. 229, 238-39, 246-47 (1976).

[6] The Sixth Circuit also vacated that portion of the District Court's Order terminating the hiring aspects of the *Youngblood* Consent Decree. Petitioners do not seek a Writ of Certiorari as to this portion of the Sixth Circuit's decision.

has been equally vigilant in protecting non-minority individuals from those same arbitrary racial classifications which formerly stigmatized African-Americans. In *Firefighters Local No. 1784 v. Stotts*, 467 U.S. 561 (1984), and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the Supreme Court struck down racial preferences and set-asides which accorded African-American employees special protection from layoffs, thereby exposing non-minority employees to layoffs they would never have undergone by customary operation of the public employers' layoff policies.

In *Regents of University of California v. Bakke*, 438 U.S. 265, 320 (1978), the Supreme Court ruled unconstitutional the set-aside program adopted by a state university medical school which reserved a certain predetermined number of slots in an entry-level medical school class for minorities, thereby excluding a non-minority individual, who, but for such a set-aside, would have been admitted to the school. *Bakke* is essentially identical to the instant claim, except that *Bakke* was applying to medical school while Petitioners were applying for a job.

In *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) this Court was presented with its most recent opportunity to rule on the issue of racial classifications which work to the detriment of innocent non-minorities. The *Croson* Court struck down Richmond's racial set-asides, which mandated that minority owned paving contractors have a certain predetermined number of city paving contracts that otherwise may have been competed for by non-minority contractors. *Id.* at 511.

The common thread running through all of these cases has been this Court's inherent reluctance to permit race-conscious remedies to redress under-representation of African-Americans in public employment, academia, or commercial dealings with public sector entities, absent some showing of prior discrimination against them. *See Croson*, 488 U.S. 469 (1989); *Wygant*, 476 U.S. 267 (1986); *Stotts*, 467 U.S. 561 (1984); *Bakke*, 438 U.S. 265 (1978). However, this Court has never directly addressed the issue of racial set-asides or quotas in the context of hiring practices of such public sector entities, the very issue these Petitioners bring before this Court. If racial classifications which operate to the detriment of minority individuals are odious and inherently suspect, hiring quotas or set-asides which operate to the detriment of non-minority individuals should be regarded with the same degree of suspicion and subject to the same strict scrutiny.

This Court in *Wygant* touched on, but did not resolve, this issue. *Wygant* contains *dicta* to the effect that applicants for public employment may enjoy a lesser degree of constitutional protection than do incumbent employees. *Wygant*, 476 U.S. at 282. The Court never defined or quantified this "lesser degree." However, in *Croson*, this Court hinted that public entities would be subject to the same constitutional strictures, whether they were dealing with incumbent public employees or job applicants. In *dicta*, this Court indicated that, in the case of jobs requiring special qualifications there must be a showing of a disproportionate relationship between the percentage of minorities selected for jobs and the percentage of minorities in a qualified applicant pool to justify hiring quotas.

Croson, 488 U.S. at 501. This uncertainty, in the wake of *Wygant* and *Croson*, as to the extent of constitutional protection afforded applicants for public employment, underscores the need for further Supreme Court elucidation.

The resolution of this hiring issue is vital. The employment of racial quotas and set-asides in the recruitment and hiring of firefighters, police officers, teachers, and other public employees throughout the country continues to engender substantial controversy and litigation, as evidenced by the countless public employers which have grappled with this issue. Disputes over the legality of racial set-asides in the hiring of firefighters and police officers alone have spawned litigation in numerous federal courts throughout the country: *Martin v. Wilks*, 490 U.S. 755, *reh'g denied*, 492 U.S. 932 (1989); *Officers For Justice v. Civil Service Com.*, 979 F.2d 721 (9th Cir. 1992); 1992 U.S. App. LEXIS 28,756 (1992), *petition for cert. filed* (1993); *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1948 (1992); *Peightal v. Metropolitan Dade County*, 940 F.2d 1394 (11th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 969 (1992); *Barfus v. Miami*, 936 F.2d 1182 (11th Cir. 1991), *reh'g en banc, denied*, 951 F.2d 1265 (11th Cir. 1991); *Donaghy v. City of Omaha*, 933 F.2d 1448 (8th Cir. 1991), *reh'g en banc, denied*, 1991 U.S. App. LEXIS 17,972 *cert. denied*, ___ U.S. ___, 112 S.Ct. 938 (1992); *Youngblood v. Dalzell*, 925 F.2d 954 (6th Cir. 1991), *on remand*, 777 F.Supp. 1382 (6th Cir. 1991); *Paganucci v. New York*, 785 F.Supp. 467 (S.D. NY 1992); *Quirin v. City of Pittsburgh*, 801 F.Supp. 1486 (1992); *Police Association of New Orleans v. Civil Service Commission*, Civil

Action No. 90-4850 (E.D. La. 1991); *Pennsylvania v. Flaherty*, 760 F.Supp. 472 (W.D. Pa. 1991).

Unless this Court addresses and strikes down the race-segregated, dual-list scheme implemented by the City, not only will Petitioners be deprived of their valuable property rights to public employment, the Sixth Circuit decision, along with other similar circuit court decisions will operate to deprive countless qualified non-minority individuals throughout the country of careers in public employment because of their race. By the same token, numerous African-Americans are stigmatized by the suspicion of their co-workers that they could not make it on their own merit. *Croson*, 488 U.S. at 721, 733, 739; *Bakke*, 438 U.S. at 298; *Krupa v. New Castle County*, 732 F.Supp. 497, 516 (D. Del. 1990).

II. QUESTION PRESENTED FOR REVIEW

1. **Absent some showing of the present effects of past discrimination, may a city constitutionally employ racial quotas, setting aside a predetermined number of positions in a fire division recruit class solely for African-American applicants, in order to meet the goals of a Consent Decree notwithstanding the use that this quota, denies positions in the recruit class to non-minority applicants solely because of their race?**

    a. ***Respondents' use of a dual hiring list is a racial classification forbidden by the Equal Protection Clause of the 14th Amendment of the United States Constitution, absent some showing of the present effect of prior discrimination.***

It is a long-standing principle of constitutional law that "[a]ny preference based on racial or ethnic criteria

must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980). Additionally, any classification "must be justified by a compelling government interest." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

One such "compelling government interest" that has always been recognized is the elimination of past discrimination. In this regard, past discrimination can be shown in one of two ways:

1. A showing that the public employer was engaged in intentional race discrimination. *Washington v. Davis*, 426 U.S. 229 (1976); or

2. Valid statistics which would establish discrimination. *Croson*, 488 U.S. at 501; *Hazelwood School District v. United States*, 433 U.S. 299, 307-308 (1977). *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 n. 20 (1977).

In this case, there is no admission of discrimination. In fact, there is clear language in the *Youngblood* Consent Decree wherein the City denies having engaged in race discrimination. (App. 32). Nor was there a judicial finding of discrimination. The *Youngblood* Consent Decree was entered into to preclude litigation on that very issue.

The only other method to establish past discrimination is through the use of statistics. Petitioners readily concede that a statistical analysis may be a useful tool to establish discrimination. However, no statistics were ever provided by Respondents. Where the at-issue jobs are not unskilled, but rather skilled, such as the fire recruit jobs

at issue herein, one must undertake a statistical analysis comparing the percentage of minorities in the at-issue jobs with a qualified labor pool. *Croson*, 488 U.S. at 501; *Hazelwood*, 433 U.S. at 308. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 650 (1989).[7]

Hazelwood is instructive. At issue in *Hazelwood* was whether a school district in suburban St. Louis discriminated in the hiring of black teachers. *Hazelwood*, 433 U.S. at 301. In determining that it did, the Supreme Court compared the percentage of black teachers in the Hazelwood School District with the percentage of black teachers in the entire St. Louis Metropolitan area. *Id.* at 308, n. 13. Because the percentage of black teachers in Hazelwood was far lower than the percentage of black teachers in the St. Louis Metropolitan area, the Supreme Court concluded that the Hazelwood School District had indeed discriminated. *Hazelwood* 433 U.S. 299.

The unique statistical methodology applied in skilled-position cases, like *Hazelwood*, was echoed by this Court in *Croson*:

> In the employment context, we have recognized that for certain entry level positions or positions

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[7] It is undisputed that only one in ten applicants pass all of the requirements and make the hiring lists. Prior to sitting for and passing a rigorous written examination, potential recruits must also pass a physical ability test, polygraph test, background check, criminal record search, and physical and psychological examination. Respondent's City Personnel Specialist stated in her deposition that only ten percent (10%) of those who actually sign up as recruit candidates make it all the way to the hiring list (App. 61). Ninety percent (90%) of those who begin the process are winnowed out along the way.

> requiring minimal training, the statistical comparisons of the racial composition of an employer's work force to the racial composition of the relevant population *may* be probative of a pattern of discrimination . . . *But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.*

Croson, 488 U.S. at 501-502 (emphasis added); *See also Wards Cove Packing Co. v. Atonio*, 490 U.S. at 650 (1989).

The Sixth Circuit had no such detailed statistical analysis to review. In fact, there was no statistical evidence upon which to base the dual lists. The Sixth Circuit merely stated that "the statistical inquiry here compares the racial composition of the City's Fire Division with that of the relevant *qualified labor market.*" (App.21). (Emphasis added.) The Sixth Circuit also noted that "[t]his court has already recognized that *the manifest imbalance in the Fire Division* with regard to racial composition justified the 1974 order implementing the decree" (App. 21-22).

However, at no time did the Sixth Circuit bother to identify the "relevant qualified labor market". It posited no statistical comparison whatsoever demonstrating an imbalance between the number of African-Americans in the Fire Division in 1974 and any qualified labor market. Thus, the Sixth Circuit decision failed to follow the standards set forth in *Croson*, 488 U.S. at 501-502 and *Hazelwood*, 433 U.S. at 308.

Furthermore, merely reciting that there is a "manifest imbalance" in the Fire Division is hardly tantamount to a

statistical finding of discrimination. Again there was never a pre-1974 empirical study or comparison, under the *Hazelwood, Croson,* and *Wards Cove* case formula, between African-Americans in the Fire Division, or the Fire Division Recruit Class, with a labor pool of individuals who were qualified to become fire recruits within the metropolitan Cincinnati area.[8]

The Sixth Circuit draws heavily on its own decisions in *Youngblood v. Dalzell* to support its finding that a statistical case of discrimination has existed. *Youngblood v. Dalzell,* 925 F.2d 954 (6th Cir. 1991); *Youngblood v. Dalzell,* 804 F.2d 360 (6th Cir. 1986); *Youngblood v. Dalzell,* 568 F.2d 506 (6th Cir. 1978). However, nothing in the long series of *Youngblood* decisions suggests a statistical imbalance under the *Hazelwood* or *Croson* formula to justify a finding of past discrimination. Indeed, the only statistics relied upon by the Sixth Circuit in *Youngblood* are those which compare the pre-1974 number of African-Americans in the Fire Division with the pre-1974 number of African-Americans *in the general population of the City of Cincinnati. Youngblood,* 925 F.2d at 955.

The mere comparison of minorities in at-issue jobs with minorities in the general population has long been disfavored by this Court as a method of demonstrating

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[8] This Court recently refused to grant a Writ of Certiorari in the case of *Vogel v. City of Cincinnati* No. 91-2001. That case was substantially different from this, in that there was clear and admitted evidence of discrimination against women and statistical evidence offered of discrimination against African-Americans. In this matter, no evidence of any nature was presented upon which the decree could be based.

past discrimination. *Croson*, 488 U.S. at 501; *Hazelwood*, 433 U.S. at 308 n. 13. Such a comparison will, at most, demonstrate societal discrimination, and perhaps demonstrate only that minorities in question tend to pursue careers other than firefighter. It does not demonstrate that the City is responsible for the low numbers of minorities in the fire division. Thus, the Sixth Circuit's basis for finding past discrimination as a pre-requisite to justifying race-conscious relief in this case is wholly inconsistent with established Supreme Court methods for determining whether there is a present effect of prior discrimination.

b. ***Petitioners have been deprived of their right to equal protection under the Fourteenth Amendment of the U.S. Constitution irrespective of whether or not the fire recruit test scores were validated.***

The Sixth Circuit clearly erred when it held that the written recruit examination was not validated in accordance with EEOC guidelines. (App. 23). Respondent City Personnel Specialist Carol Callahan stated in discovery that the test was validated and explained the method of validation. (App. 57-58).

The Sixth Circuit further held that since the test *scores* were not validated so as to predict a significant difference in job performance by recruits, Petitioners could not assert an equal protection claim based on their rejection for admission to the recruit classes, even though African-Americans who scored lower on the test were admitted. The import of the Sixth Circuit's decision is that, without score validation, relative scores mean nothing, and all

who scored with a passing grade or above were "equally qualified."

Such a holding would sanction quotas as a redress for societal discrimination. Since the exam is already "content" validated, score validation would do nothing more than recognize that a written exam, *per se*, may be "culturally biased". This is what Intervening Respondents have argued; an argument with which the Sixth Circuit apparently agrees. (App. 60). Under such a doctrine, societal discrimination, could be used to force the innocent public employer to implement a race-conscious quota, with its obvious impact on innocent non-minority individuals.

Even if the relative test scores among recruit class applicants are meaningless, as the Sixth Circuit decision suggests, the decision below nonetheless misconstrues Petitioner's argument. The gravamen of Petitioner's case is not simply that African-Americans with lower scores were admitted into the class. Petitioners challenge the City's reservation of a pre-determined number of positions in a recruit class for African-American applicants, irrespective of test scores.

Even if the test were "pass-fail", similar to a physical agility test or a psychological test, and all the individuals who passed the exam were equally qualified, Respondent City can not arbitrarily set aside a certain number of slots for African-Americans. This is no less a blatant racial set-aside than the minority business set-aside which was roundly condemned by the Court in *Croson* or the medical school set-aside in *Bakke*. *Croson*, 488 U.S. 469 (1989); *Bakke*, 438 U.S. 265 (1977).

c. ***Applicants for public employment do not possess a lesser degree of constitutional protection against deprivation of equal protection than do incumbent public employees.***

Relying upon *Wygant*, the Sixth Circuit decision denigrated Petitioners' status as that of mere applicants for employment, who were deserving of lesser constitutional protection than incumbent employees. (App. 21). The Sixth Circuit not only stretched the dicta of *Wygant*, but ignored the language of *Croson* and *Bakke*. In *Wygant* this court did not state that applicants for public employment possess no constitutional rights. Were that the case, public employers could, with impunity, maintain a blatant policy of excluding African-Americans from various jobs. Not only would such a racial screening device violate numerous federal statutes dealing with employment discrimination, but would also offend the Fourteenth Amendment.

Historically, this Court has vigorously safeguarded the rights of "outsiders" who were being denied property rights on the basis of their race, even in those rare cases, like this one, where the victims are being deprived of their rights because of their *non-minority* status. In *Bakke*, a white applicant's status as an "outsider" did not bar him from successfully challenging the racial quotas of the state medical school which prevented his admission. *Bakke*, 438 U.S. 265. Similarly, in *Croson*, a non-minority owned paving contractor successfully challenged the constitutionality of a minority business set-aside program, the operation of which prevented it from obtaining paving contracts from the City of Richmond. *Croson*, 488 U.S. 469.

Petitioners in this case are all non-minority individuals who fulfilled the City Fire Division's selection criteria and received scores that would have placed them in the recruit class under operation of state law. They are just as much "outsiders" as were the plaintiffs in *Bakke* and *Croson*. To the extent that the Sixth Circuit decision below interprets *Wygant* as suggesting a dramatic relaxation of constitutional protection for mere applicants for employment, *Croson* and *Bakke* suggest no relaxation at all.

Further, these Petitioners are not an undefined mass of individuals applying for some theoretical entry level position. All of them have survived a gauntlet of rigorous statutorily mandated screening steps ranging from physical exams and agility tests to psychological profiles and criminal background checks. They have all taken and scored very well on a written examination. Ohio law requires admittance of fire recruit candidates in order of excellence as shown by their test scores. Therefore, Petitioners had every right to expect that they would be hired as fire recruits based on state statute. Their property right deprivation is hardly theoretical.

Moreover, the harm Petitioners have suffered is substantial. This is not a case where one's promotion or placement into an apprenticeship program, or one's promotion has been merely delayed. Petitioners have been denied employment altogether.

As if to minimize the harm done to Petitioners, the Sixth Circuit notes that some of them ultimately achieved entry into a subsequent recruit class. This is beside the

point. Many other Petitioners did not achieve entry. Having been barred from entry into the Fire Recruit Class, many Petitioners were forced by economic necessity to choose careers elsewhere. Others, who would have been accepted in one class have been precluded from subsequent classes by operation of the unlawful quota. Therefore, the city's racial quota results in an irreparable loss of employment.

Even for those fortunate enough to achieve entry into a subsequent class, their harm, too, is irreparable. For the remainder of their careers in the Fire Division, these Petitioners will always possess less seniority than they would have possessed had they been admitted into the first recruit class. They will be more vulnerable to lay offs and will also lag behind their peers in the accumulation of time-in-grade, which is a prerequisite to the taking of promotional examinations.

d. ***Respondent City's mere desire to increase minority participation in its Fire Division was not a sufficiently overwhelming and compelling governmental interest to justify the imposition of race-based quotas.***

Petitioners herein do not attack the concept of affirmative action, nor do they ask this Court to find affirmative action in a general sense to be unconstitutional. The *Youngblood* Consent Decree itself contains many constructive measures for achieving its goals for bringing African-Americans into the fire division. It provides for aggressive recruiting in the minority media, elimination of irrelevant screening criteria which act as built-in barriers to

minority participation, and other useful measures. (App. 34-37). Other affirmative measures could have been implemented which did not adversely impact non-minorities. In *Bakke*, this Court noted with approval the state medical school's award to minority applicants of certain "quality points", similar to a veteran's preference, to augment their test scores. *Bakke*, 438 U.S. at 317.

However, Respondent City went too far when it created the dual-hiring list with its racial quotas. This Court has repeatedly condemned such racially discriminatory measures, notwithstanding the good faith intentions of the political subdivisions which implement them.

In striking down the racially-based minority business set asides in *Croson*, this Court noted the absence of a finding that the City of Richmond ever discriminated, or even a statistical finding that a disproportionate number of minority paving contractors who were *qualified* to receive city contracts did not get them. Writing for the plurality Justice O'Connor stated:

> Absent searching judicial inquiry into the justification for such race based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.

Croson, 488 U.S. at 493.

> That Congress may identify and redress the effects of society wide discrimination does not mean that, *a fortiori*, the states and their political subdivisions are free to decide that such remedies are appropriate . . .

> The mere recitation of a benign or compensatory purpose for the use of a racial classifications would . . . insulate any racial classifications from judicial scrutiny.

Id. at 490.

In so holding, the Supreme Court was merely echoing the sentiments which have been articulated by this Court in other affirmative action cases, wherein race-conscious classifications were struck down. *See Johnson v. Transportation Agency,* 480 U.S. 616, 637-638 (1987); *Wygant v. Jackson Board of Education,* 476 U.S. at 276.

In *Regents of the University of California v. Bakke,* as in the instant case, there was never a finding, either statistical or otherwise, of discrimination by the public entity, only a well-meaning desire to increase minority enrollment in the medical school. The language of *Bakke* in striking down these set-asides is equally applicable here.

> Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids . . .
>
> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative or administrative findings of constitutional or statutory violations.

Bakke, 438 U.S. at 307. This is precisely what the Sixth Circuit has done here. In its zeal to vindicate Respondent City's right to carry out its admirable goal of increasing minority participation in the Fire Division, the Sixth Circuit Court below has allowed Respondent City to run

roughshod over Petitioner's constitutional rights. This is a gross constitutional deprivation which warrants review by this Court.

e. *The Sixth Circuit's refusal to find that Petitioners' constitutional rights to equal protection were violated is in conflict with decisions of other circuits.*

Racial set-asides, absent discrimination, have been condemned by at least two circuits as violative of non-minority applicants' rights to equal protection as guaranteed by the Fourteenth Amendment. *Commonwealth v. Flaherty*, No. 92-3031, ___ F.2d ___, 1993 U.S. App. LEXIS 819 (3d Cir., Jan.20, 1993); *Ledoux v. District of Columbia*, 820 F.2d 1293, 1302 (D.C. Cir. 1987). In *Flaherty*, the Third Circuit struck down a race-conscious quota implemented by the City of Pittsburgh to remedy statistical disparities. While the results of a content-validated hiring examination did result in a disproportionate impact on minorities, there was no evidence the statistical disparities were caused by discrimination. *Flaherty*, No. 92-3031, ___ F.2d ___, 1993 U.S. App. LEXIS 819 (3d Cir., Jan. 20, 1993); *See Krupa v. New Castle County*, 732 F.Supp. 497, 512-513 (D. Del. 1990) (many reasons other than discrimination exist for statistical disparities; absence of sufficient statistical showing of discrimination to support set-asides).

The District of Columbia Circuit in *Ledoux* stated that it was not prepared to embrace an affirmative action plan that completely forecloses employment to some non-minority or male candidates. *Ledoux*, 820 F.2d at ___. Even where pre-1972 discrimination was conceded, a one-third

quota for female firefighter applicants was overturned because it was not narrowly tailored. *Quirin v. City of Pittsburgh*, 801 F.Supp. 1486 (1992).

However, the Sixth Circuit has not been the only circuit to uphold a political subdivision's use of dual hiring lists to staff its recruit classes for fire, police, or other protective services. A Constitutional challenge to this practice also failed in *Donaghy v. City of Omaha*, 933 F.2d 1448, 1461 (8th Cir., 1991). *See also, Billish v. City of Chicago*, 962 F.2d 1269 (7th Cir. 1992) (where dual lists in promotions were upheld)[9]; *Mackin v. City of Boston*, 969 F.2d 1273 (1st Cir. 1992) (where lower scoring minority recruits were hired where there was a finding of discrimination).

Granting of this Petition for Writ of Certiorari is especially warranted where, as here, there exists a conflict between the circuits, as to the constitutionality of racial set-asides for the hiring of public employees. The Supreme Court should resolve this conflict.

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[9] Plaintiffs' motion for hearing *en banc* was recently granted by the Seventh Circuit and oral argument held. The Seventh Circuit has not yet handed down a decision to date.

CONCLUSION

For all the reasons set forth herein, it is respectfully submitted that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TIMOTHY JANSEN, ET AL.,

Plaintiffs,

v.

CITY OF CINCINNATI,

Defendants,

Civil No.
C-1-89-079
C-1-89-479
C-1-90-151

ORDER

This matter is before the Court on cross-motions for summary judgment the determination of which will by agreement of counsel be dispositive of the issues in this matter. Plaintiffs assert that a Consent Decree entered into in 1974 has by its operation denied them of rights conferred by the laws of the State of Ohio. In accordance with Rule 52, Fed. R. Civ. P., the Court does hereby set forth its Findings of Fact, Opinion and Conclusions of Law.

I.

FINDINGS OF FACT

1. There is no factual dispute between the parties and the following recitation of facts is intended more for background than any judicial determination by the Court.

On May 7, 1974, in the case of *Tilford Youngblood v. John Dalzell*, Civil No. 8774, parties entered into a Consent

Decree determining hiring and promotions in the City of Cincinnati Fire Division.

2. Of significance to the matter before the Court are the following:

A. Consent Decree, paragraph 22: "Subject to the availability of qualified applicants, defendant shall adopt and seek to achieve a goal of hiring sufficient numbers of qualified minority persons to achieve a work force composition which will not support any inference of racial discrimination in hiring. *Such goal shall be deemed to have been achieved when at least eighteen percent (18%) of the Division of Fire Personnel of the City of Cincinnati are minority persons.*" (Emphasis added)

Paragraph 22 continues by assigning numerical percentages and dates by which those percentages should be achieved. From a minimum of 4.2% by December 31, 1974, the "goal" proceeds to a maximum of 18% by December 31, 1980.

B. Paragraph 23 of the Consent Decree contains the following language:

> "Defendant shall be deemed to have sought to achieve each stage of the work force composition goals when and as the above percentages of Fire Division Personnel are minority persons . . . defendants shall be deemed to have sought to achieve each stage of the work composition goals *in good faith* if at least forty percent (40%) of the total fire recruit class for any given year consists of minority persons." (Emphasis added).

C. Ohio Revised Code § 124.26 enjoins upon the Civil Service Commission the following obligation: " . . . [it] shall prepare an eligible list . . . of such persons [who] shall take rank upon the eligible list as candidates in the order of their relative excellence as determined by the examination . . . "

D. Ohio Revised Code § 124.27 requires the Civil Service Commission to "certify to the appointing authority the names and addresses of the three candidates standing highest on the eligible list for the class or grade to which the position belongs; . . . the appointing authority shall notify the director of such position to be filled and he shall fill such position by appointing one of the three persons certified to him."[1]

3. The plaintiffs took an examination on January 30, 1988, for appointment to the Fire Division of the City of Cincinnati. Following grading of the examinations, the defendants proceeded in the following fashion:

A. Two lists of eligible persons were prepared: one known as the Fire Recruit Majority List for nonblack fire recruit candidates; and the other referred to as the Fire Recruit Minority List for black fire recruit candidates.

B. In advance of such examination defendants determined that 40% of the class would be taken from the Minority List and 60% would be taken from the Majority List.

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[1] This provision is sometimes referred to as "The Rule of Three."

4. The plaintiffs were all included in the Fire Recruit Majority List and none were appointed. Examinees on the Minority List who had scores below those of plaintiffs were appointed.

5. Since December 31, 1986, the staffing level of the Fire Division has consisted of 18% or more minority individuals.

II.

OPINION

A. Introduction

Any consideration of the problem presented herein must begin with an understanding of Civil Service. In the 1880's a society weary of public jobs filled by patronage and fed up with the adage: "To the victor belongs the spoils," gave sufficient support to the concept of Civil Service that Congress did in 1883 pass the first Civil Service bill. It was known as the Pendleton Act. It was named in honor of George Hunt Pendleton, a senator who resided in Cincinnati.

Civil Service began in the City of Cincinnati shortly before the outbreak of World War I. It became a basic part of city government in Article V of the City Charter adopted in 1926. Civil Service is based upon a simple concept: The public is entitled to the most qualified person in every appointive public job. The critical word is "qualified" and that term has been altered from time to time. Both the General Assembly of Ohio and the courts have varied that term as the needs of society have required. Shortly after WWI a determination was made

that those persons who had served in the military service were entitled to assistance in the awarding of Civil Service jobs. Such persons were given additional credit on passing scores[2]. This credit is known as "Veterans Preference," and did affect the definition of "qualified." There is nothing wrong with Veterans Preference. It is a legislative response to a perceived need by society in order properly to assist those people who had served their country in the military. It does, however, tend to penalize women in those situations where they compete with male veterans for appointment. In the absence of a universal draft, far fewer women have served in the military. The reference herein to Veterans Preference is merely to demonstrate that society, through its elected representatives, may change Civil Service concepts.

Such concepts may also be changed by a judicial response. Within the past 25 years society has perceived an unfair aspect of Civil Service as it affects blacks. The judicial solution was the application of "Affirmative Action". Minority persons were assisted in obtaining jobs under Civil Service, by further defining the word "qualified." In the matter at hand Affirmative Action was accomplished by the Consent Decree. Such Decrees have served a useful purpose. They are an accepted method and they have been approved by appellate courts. The Consent Decree herein was specifically approved by the United States Court of Appeals for the Sixth Circuit in *Youngblood v Dalzell*, 568 F.2d 506, (6th Cir. 1978).

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[2] "Veterans Preference" is currently set forth in Ohio Revised Code § 124.23.

However one describes the need and the merits of Consent Decrees, should not be unlimited and open end. They embody the immutable logic reffered to in the following quotation from *Alice in Wonderland:* "The more there is of mine, the less there is of yours."[3] With a limited number of jobs available, the selection of any applicant contrary to Ohio Civil Service law will require the penalizing of someone else.

B. The Consent Decree

The Consent Decree in this matter is almost fifteen years old. A consideration of it requires a careful examination of paragraphs 22 and 23 (Findings of Fact 2A and 2B). A distinction must be drawn between them. Paragraph 22 sets forth in specific terms the "goal" that the Consent Decree sought to achieve. That goal required 18% of the Division of Fire Personnel of the City of Cincinnati to be minority persons by December 31, 1980. It is irrelevant to this inquiry whether or not the goal was reached by that date. The critical date herein is August 7, 1988, when plaintiffs sat for the examination. On that date the goal had been reached.

Paragraph 23 does not set forth goals, it deals instead with a test for the good faith of defendant. The Court will take judicial notice that not all persons who apply are selected for a fire recruit class. Arguably, such persons could be rejected for discriminatory reasons and the goal of paragraph 22 never reached.

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[3] *The Annotated Alice,* Bramhall House, 1960. Pg. 122.

Paragraph 23 is what it appears to be. It sets forth an empirical standard whereby the good faith of the City of Cincinnati could be measured. It also protects the City against penalty if matters beyond its control prevented the achieving of the levels set forth in paragraph 22. The language of paragraph 23 is instructive and bears repetition. It provides in part:

> Defendants shall be deemed to have *sought* to achieve each stage of the work composition goals *in good faith* if at least forty (40) percent of the total fire recruit class for any given year consists of minority persons. (Emphasis added).

Somehow the simple English words have been construed to be an addendum to paragraph 22. If so, it is completely inconsistent with the "goal" of 18%. There is no language in the Consent Decree requiring the Fire Division at any time to consist of 40% minority persons. If the City of Cincinnati had elected in the Consent Decree or does elect in future Consent Decrees to establish that percentage, it may do so. The Fire Division may in fact reach that percentage, but under the current Consent Decree, it may not invoke judicial assistance to do so. The Court can only construe the existing Consent Decree which *in haec verbae* lists a maximum goal of 18%. There is no dispute among the parties that 18% had been achieved prior to the date on which these plaintiffs took the entrance examination.

The Court has previously noted that Consent Decrees are legal exercises of municipal power, but they should be strictly construed since they do supplant the statutory basis of Civil Service selection as set forth in Ohio Revised Code §§ 124.26 and 124.27.

Section 124.26 is particularly instructive since it imposes a mandatory duty upon a Civil Service Commission to rank the candidates "in the order of their relative excellence as determined by the examination . . . " Any judicial requirement that a public official avoid his mandatory duty should be carefully examined.

C. Strict Scrutiny

There is a thread that seems to run through the reported decisions of the Supreme Court on Affirmative Action that is instructive herein. Terms such as "searching examination," "strict scrutiny," and "narrowly tailored," recur with some frequency. For example, an agreement between a Board of Education and a Teachers' Union seeking to vary a lay-off policy by seniority which would impact unfavorably upon recently hired minorities was struck down by the Supreme Court in *Wygant v Jackson Bd. of Education*, 476 U.S. 267 (1986). In that case the following statement is made:

> In the context of affirmative action, racial classification must be justified a (sic) by a compelling state purpose and the means chosen by the state to effect that purpose *must be narrowly tailored.* (Emphasis added.)

In dealing with "set asides" of contracts for minorities, the Supreme Court of the United States in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) directed that such plans be subjected to "strict scrutiny." The Court determined that the plan in that case was "not narrowly tailored" and therefore not justified.

In a previous "set aside" case *Fullilove v. Klutznick*, 448 U.S. 448 at 491, the following appears:

> Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.

The Supreme Court specifically referred to a Consent Decree in *Firefighters Local Union v. Stotts*, 467 U.S. 561 at 574 in the following language:

> [the] "scope of a Consent Decree must be discerned from its four corners and not by reference to what might satisfy the purpose of one of the parties to it." *citing United States v. Armour & Co., 402 U.S. 673, 681-682 (1971).*

D. Limitation

It should be noted that the decision in this matter is a limited one. The Court finds only that the goal of the Consent Decree as it relates to hiring has been achieved. The City of Cincinnati is directed forthwith to abstain from any action to appoint fire recruits in violation of the requirements of the Civil Service laws of Ohio[4]. The Court does not find that the Consent Decree was improperly entered into or that any appointments thereunder are void. This holding does not invalidate any portion of the Consent Decree that deals with promotion since that issue is not involved herein. All persons who were

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[4] Ohio Revised Code § 124.90 provides a means whereby a city may waive, suspend, or alter the provisions of Chapter 124. Based upon advice from counsel the Court understands that such action has never been taken in regard to the Fire Division.

appointed to the Fire Division and who have not been separated therefrom have valid appointments and are entitled to all rights and benefits accruing from such appointment.

E. Remedy

The fashioning of an appropriate remedy for these plaintiffs is a difficult one. Since the Consent Decree is legal, valid and appropriate, any adverse effect upon such plaintiffs would appear to be noncompensable. The reality, however, is that the City of Cincinnati went beyond its obligations and in so doing adversely affected these plaintiffs in a limited fashion.

Under the Rule of Three, plaintiffs had no assurance of employment and should not now be employed retroactively with payments and benefits to which such employment might entitle them. The Court does direct the City of Cincinnati to "dovetail" these plaintiffs into the next list of Fire Recruits in the position their examination results would confer. Such list should be submitted to the Fire Chief for his consideration. An appointment under the Rule of Three, if any, would not be retroactive and plaintiffs would not receive seniority or benefits prior to the actual date of appointment.

As attorneys for a successful party in a civil rights action, plaintiffs' counsel are entitled to appropriate compensation. Such counsel are directed to submit to the Court within thirty days of the date of this Order an itemized list of time spent in order that fair compensation may be awarded.

It might appear that the City of Cincinnati has now been penalized twice. Undoubtedly, the City compensated adverse counsel who negotiated the Consent Decree. Now it appears that attorney fees will be awarded for a successful contest of that Consent Decree. The unfairness, however, is more apparent than real. The City of Cincinnati is not required to pay attorney fees for a successful contest of the Consent Decree. The Consent Decree per se has withstood such challenge and no counsel fees are payable therefore. Plaintiffs have only successfully objected to conduct beyond the Consent Decree. It is for that activity alone that the Court will award compensation. Since exceeding the Consent Decree was a voluntary act by the City of Cincinnati, it did in fact violate the civil rights of these plaintiffs.

III.

CONCLUSIONS OF LAW

A. This Court has jurisdiction pursuant to 42 U.S.C. § 1983.

B. A Consent Decree which provides for a favored treatment of minorities in order that the total employment percentage of that minority be increased is not per se invalid and represents an acceptable method of correcting a racial imbalance. *Youngblood v Dalzell,* 804 F.2d 360, (6th Cir. 1986).

C. Consent Decrees which operate to violate the Civil Service laws of Ohio must be strictly construed and not extended beyond the specific terms thereof. *Fullilove v. Klutznick,* 448 U.S. 448 at 491 (1980).

D. Where a stated percentage of minority employment has been achieved for a substantial period of time, that portion of a Consent Decree is at an end and may be terminated as to such hiring practices. *Board of Education of Oklahoma City Public Schools v. Dowell, Et al.*, 1991 U.S. Lexis 484; ___ U.S. ___ (1991).

E. A Consent Decree which includes both hiring and promotional practices is severable and a Court may terminate the hiring practices set forth therein while not affecting the validity of the promotional aspects of such Decree.

F. Where by statute successful candidates of a hiring examination are subject to the "Rule of Three," a remedy for successful plaintiffs may only place them back on an eligible list but not require the appointing authority to waive its rights under the Rule of Three.

G. In view of the foregoing, Plaintiffs' Motion for Summary Judgment is hereby GRANTED to the extent set forth herein. Defendants' motion for summary judgment is DENIED. Plaintiffs' counsel are entitled to appropriate compensation.

IT IS SO ORDERED.

/s/ Carl B. Rubin
Carl B. Rubin
United States District Judge

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 91-3498/3499/3500

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY JANSEN, DANIEL K. GOENS, ROBERT H. PRASSE, EVAN WOOD, and MARK E. MONAHAN;

WILLIAM NEAL, BRIAN CLEMENS, FRANK GORRASI, GREGORY HISSETT, and PHILIP S. RAMSTETTER;

DANIEL R. CORRY, NOAH A. GIBBS, IV, TIMOTHY P. BURWICK, LAWRENCE D. CAPPEL, ROBERT HART, JEFFREY H. SWEET, MARK E. KREIMER, NICHOLAS SCHIBI, and TIMOTHY A. CUNNINGHAM,

Plaintiffs-Appellees, Cross-Appellants (91-3500),

v.

CITY OF CINCINNATI, SCOTT JOHNSON, CIVIL SERVICE COMMISSION, WILLIAM MILLER, and NORMAN WELLS,

Defendants-Appellants (91-3498), Cross-Appellees,

TILFORD YOUNGBLOOD, RALPH NICHOLS, and THE PLAINTIFF CLASS CONSISTING OF BLACK APPLICANTS FOR AND BLACK EMPLOYEES OF THE DIVISION OF FIRE OF THE CITY OF CINCINNATI,

Intervenors-Appellants (91-3499), Cross-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio

Decided and Filed October 13, 1992

Before: KEITH and MILBURN, Circuit Judges; and WOODS, District Judge.[1]

DAMON J. KEITH, Circuit Judge. The Several appeals in the present action arise from the March 18, 1991, order from the Southern District of Ohio, which dissolved a portion of a 1974 consent decree entered into by the City of Cincinnati (hereinafter "the City"). The decree sets forth a plan for the recruitment, hiring, and promotion of minority fire division personnel. For the reasons stated below, we VACATE the order and REMAND the case to the district court for further proceedings consistent with this opinion.

I.

The City, the Legal Aid Society and the Ohio Attorney General entered into a Consent decree that was approved by the United States District court, Southern District of Ohio, in May 1974. The decree sets forth various steps to be taken by the City for the purpose of integrating its Fire Division. The decree contains provisions regarding the advertisement of job openings to reach minority applicants, the recruitment, hiring, promotion of minorities within the Fire Division and overall

[1] The Honorable George E. Woods, United States District Judge for the Eastern District of Michigan, sitting by designation.

record keeping. With respect to hiring, the City agreed to pursue an overall workforce composed of eighteen percent minorities. Paragraph 22 of the decree states in pertinent part:

> Subject to the availability of qualified applicants, Defendants shall adopt and seek to achieve a goal of hiring sufficient numbers of qualified minority persons to achieve a work force composition which will not support any inference of racial discrimination in hiring. Such goal shall be deemed to have been achieved when *at least eighteen (18) percent of the Division of Fire Personnel of the City of Cincinnati are minority persons.* In order to reach this goal, Defendants shall adopt and seek to achieve a goal of hiring sufficient minority persons so that the personnel in the Division of Fire will be:
>
> 4.2 % Minority by December 31, 1974
>
> 6 % Minority by December 31, 1975
>
> 8 % Minority by December 31, 1976
>
> 10.5 % Minority by December 31, 1977
>
> 13 % Minority by December 31, 1978
>
> 15.5 % Minority by December 31, 1979
>
> 18 % Minority by December 31, 1980
>
> (emphasis added).

Paragraph 23 states further:

> Defendants shall be deemed to have sought to achieve each stage of the work force composition goals when and as the above percentages of the Fire Division personnel are minority persons either on or within one month before or after the

> above dates; provided, however, that Defendants shall be deemed to have sought to achieve such stage of the work composition goals in good faith *if at least forty (40) percent of the total recruit class for any given year consists of minority persons* (emphasis added).

To achieve the hiring goals of this consent decree, the City has implemented a procedure which creates two lists for hiring consideration. The Fire Recruit Majority List consists of those non-minority candidates who have successfully completed all phases of the Fire Recruit selection process. The Fire Recruit Minority List consists of those minority candidates who successfully completed all phases of the Fire Recruit selection process. The City has taken sixty (60) percent from the majority list and forty (40) percent from the minority list to accomplish the stated forty percent objective of paragraph 23 of the Consent decree.

> Paragraph 27 of the Decree further mandates the following:
>
> Defendants shall use a system for promoting qualified minority persons within the ranks of the Division of Fire to achieve a goal of a work force composition which negates any inference of an unlawfully discriminatory promotion policy based on race.

The last sentence of the consent decree states: "At any time after the objectives of this decree have been achieved, the Defendants may move this Court, on due notice, for dissolution of the Decree." The City has not moved the district court for dissolution of the consent decree and has indicated that it does not intend to do so. Accordingly, all of the terms of the Decree remained in

effect at the commencement of this litigation. *See Youngblood v. Dalzell,* 123 F.R.D. 564 (S.D. Ohio 1989).

The Cincinnati Fire Division's selection process is an extensive multi-step process to assess the qualifications of applicants. The total process consists of a written examination, a physical ability test, a medical examination, a background investigation, and a psychological evaluation. A score of seventy (70) or above on the written examination is passing. Each of the other components are scored pass/fail.

After the applicants successfully advance through the first five steps of the selection process, they are then placed on an eligible list and certified to the Fire Chief for consideration for hiring under the "Rule of Three" process of the Ohio Civil Service Commission. Ohio Rev. Code § 124.27. The Rule of Three permits the Fire Chief to select a candidate for hiring from the top three people on the eligible list. It does not guarantee employment to those ranking highest on a given eligibility list, but merely guarantees hiring consideration.

The three cases at issue herein were consolidated by orders of the district court due to the identical nature of the claims of the plaintiffs in all of the cases.[1] All three classes of plaintiffs were white applicants for the position of fire recruit. They each claim they were wrongfully denied such positions in the recruit classes between 1988

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[1] The plaintiffs in *Jansen v. City of Cincinnati* claim they were wrongfully denied hiring from the fire recruit class in 1988. The plaintiffs in *Neal v. City of Cincinnati* and *Corry v. City of Cincinnati* claim that they were wrongfully denied hiring in classes in 1989 and 1990.

and 1990. Plaintiff's argue principally that since they scored higher on the Civil Service examination than any of the minorities appointed under the terms of the Decree, they should have been hired. The plaintiffs sought relief in the form of immediate job placement in the fire department and backpay from the date of the alleged discrimination. We note that, of the fifteen plaintiffs in this consolidated action, nine have been hired by the Cincinnati Fire Division as recruits in subsequent recruit classes.

In addition, this Court previously granted the petition to intervene filed by a class consisting of black applicants and black employees of the Fire Division (collectively "Intervenors"). The Intervenors claim that the city has engaged in racially discriminatory hiring practices in the past few years. *See Jansen v. City of Cincinnati*, 904 F.2d 336 (1990).

In the proceeding at bar, the district court made certain findings of fact and conclusions of law. The court first found that the "maximum goal of 18%" in the consent decree had been achieved in 1986. The district court then found that the implementation of the dual list was not authorized by the wording of the consent decree. Accordingly, the district court held: "Where a stated percentage of minority employment has been achieved for a substantial period of time, that portion of a Consent decree is at an end and may be terminated as to such hiring practices." The district court then dissolved the hiring provision of the decree and held that this paragraph was severable from the rest of the decree. Additionally, the district court noted that, because the process is "subject to the 'Rule of Three', a remedy for successful

plaintiffs may only place them back on an eligible list but not require the appointing authority to waive its rights under the Rule of Three." The court, thereby, denied plaintiffs' request for job placement and backpay. Furthermore, the district court ignored the claims of racial discrimination in the selection process made by the Intervenors when it dissolved the hiring provision.

The respective parties appealed from each adverse ruling. Because the district court's interpretation of Paragraph 22 contravenes the original stated purpose of the consent decree, we REMAND the case to the district court for proceedings consistent with this opinion.

II.

On appeal, the plaintiffs principally argue that the district court did not provide a sufficient remedy to compensate them for the grieved wrong. They also argue that the City's implementation of the dual lists to fulfill its obligations under the decree involved the use of impermissible quotas. Because the remedy necessarily depends on the asserted right, we first address the validity of the City's utilization of dual lists in hiring fire recruits.

This Circuit has recently set the parameters within which we review challenges to consent decrees in *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992). The *Vogel* Court stated:

> [A] consent decree, although in effect a final judgment, is a contract founded on the agreement of the parties. . . . It should be construed to preserve the position for which the parties bargained. . . . A consent decree "is not enforceable

> directly or in collateral proceedings by those who are not parties to it. . . . " It "may be challenged only on the ground that its substantive provisions unlawfully infringe upon the rights of the complainant." . . .
>
> . . . To have standing, a party must be aggrieved by the judicial action from which it appeals. . . . Regardless of how moderate a preference the decree accords women and minorities, if there is some detriment to the party challenging the decree, that party has sufficient standing to challenge the decree. Moreover, in the recent case of *Martin v. Wilkes*, 480 U.S. 755 (1989), the Court adhered to the general rule that a party cannot be deprived of rights at a proceeding to which he is not a party. The (Supreme) Court held in *Martin*, that people who are not made a party to a consent decree have standing to commence an action challenging the constitutionality of the decree as it is applied to them.

Vogel, 959 F.2d at 598-99 (citations omitted).

Analyzing the facts of this case in accordance with *Vogel*, these plaintiffs lack standing to challenge the City's interpretation of the consent decree. Moreover they lack standing to have that decree interpreted upon their own terms. Our review is thus limited to the plaintiffs' challenge to the constitutionality of the decree as it is applied to them. With that premise, we evaluate the City's fire division consent decree and the district court's interpretation of that decree in its order of March 18, 1991.

A.

The City's implementation of the consent decree has resulted in their adoption of what has traditionally been

termed an affirmative action plan. *See, e.g., Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992); *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986). The Supreme Court has recently determined that in our review of a race-conscious affirmative action program, we must evaluate the implemented scheme under strict scrutiny. *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 274 (1986) *See generally, City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Any such classification must be narrowly tailored to achieve the stated objective and that objective must be compelling. *Wygant*, 476 U.S. at 274. In our review of affirmative action plans, this Circuit has noted that "although initial employment opportunities coupled with hiring goals may burden some innocent individuals, they do not impose the same type of intrusive injuries that layoffs, which result in loss of job expectancy, security, and seniority, involve." *Long v. City of Saginaw*, 911 F.2d 1192, 1196-97 (6th Cir. 1990) (citing *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 283 (1986)).

While a strong evidentiary basis must exist to conclude that remedial action in the form of affirmative action is necessary, "evidence of wide statistical disparities . . . may justify an affirmative action policy adopted by a public employer." *Wygant*, 476 U.S. at 274-75. The statistical inquiry here compares the racial composition of the City's Fire Division with that of the relevant qualified labor market. *Vogel*, 959 F.2d at 599-600 (citing *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 274 (1986) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)). This Court has already recognized that the manifest imbalance in the fire division with regard to racial composition justified the 1974 order implementing the

decree. *See Youngblood v. Dalzell*, 804 F.2d 360, 364 (6th Cir. 1986).

Our second inquiry focuses on whether this affirmative action mechanism, employed since the inception of the consent decree and used in the selection process between 1988 and 1990, was narrowly tailored to accomplish the stated goal. This inquiry is of particular importance because it directly relates to whether the district court correctly dissolved the eighteen percent (18%) hiring goal of the consent decree in its February 1992 order.

In assessing whether the "dual list" procedure was narrowly tailored to accomplish the stated objectives of the consent decree, Justice O'Connor's comments in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) are instructive. Justice O'Connor wrote for a plurality of the Court:

> [T]he purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. This test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Croson, 488 U.S. at 493. We note further the Justice O'Connor, in *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986), found that the non-minority challengers of the affirmative action plan bear the burden of establishing that their constitutional rights have been violated. *Wygant*, 476 U.S. at 277-78, 293. We note that in the several appeals involving the city's Fire Division consent

decree that have come before this Court, this Circuit has validated, *sub silencio,* the City's use of dual lists for hiring purposes. *See Youngblood v. Dalzell,* 925 F.2d 954 (6th Cir. 1991); *Youngblood v. Dalzell,* 625 F.Supp. 30 (S.D. Ohio 1985), *aff'd,* 804 F.2d 360 (6th Cir. 1986), *cert. denied,* 480 U.S. 935 (1987).

The plaintiffs assert that, because the City did not elevate them to the eligible lists on the basis of ranked test scores and in accordance with the Civil Service Exam system, their constitutional rights were violated. Paragraph 25 of the consent decree is instructive with regard to the proper use of the written examination scores. Paragraph 25 states:

> In no event shall the Division of Fire be required to hire a person as a fire recruit who is not qualified. *Scores on selection procedures which have not been validated in accordance with the EEOC guidelines or scores on validated standards which are not sufficiently different as to predict a significant difference in job performance shall not be used in determining the qualifications of applicants.* A valid ranking of all applicants for the position of fire recruit is not prohibited by this paragraph. (emphasis added)

The decree clearly permits the use of properly validated test scores to rank recruits. These written examinations, however, have not been validated in accordance with EEOC guidelines. Moreover, no evidence has been presented to indicate that the scores which result "predict a significant difference in job performance."

The plaintiffs argue that the eligible list rankings for "Rule of Three" purposes are taken directly from the test

results. They argue that, because the Fire Division uses the test scores in this manner, there must be a necessary correlation between one's exam performance and one's job performance. While this may be a convenient method of elevating persons to the Rule of Three eligible list, there is no indication that the chosen fire personnel, who score higher on the exam, perform better on the job. The test merely ensures, as required by the consent decree, that each fire recruit is "qualified."

We further note that had the City not utilized the dual lists between 1988 and 1990 for hiring, significant under-representation of minorities in each class would have resulted. Absent the affirmative action procedure from 1988-1990, less than ten (10) of one hundred fifteen (115) applicants elevated for Rule of Three purposes would have been minorities. Utilizing the dual lists, however, the total number of minority hirees was consistent with the relevant pool of applicants in each of the three years.

Moreover, each of the minorities placed on the eligible list was qualified to be hired. Each applicant elevated to the Rule of Three stage and subsequently hired successfully completed each of the five components of the evaluation process. Each applicant was required to pass a security clearance and undergo physical, medical, and psychological evaluations. Additionally, as noted above, the written examination is only one of five components in the evaluation process, and the test was validated only as to content and not for rank order. Accordingly, these plaintiffs had no reasonable expectation that hiring would be solely on the basis of ranked exam scores.

For each of the above stated reasons, we hold that the use of the dual lists in implementing the consent decree is constitutional and did not abridge any of the applicants' constitutional rights. This holding is consistent with this Circuit's previous pronouncements regarding the validity of this consent decree.

B.

The district court's order appears to render the above discussion moot in light of three findings made by the district court. The district court first stated that "[s]ince December 31, 1986, the staffing level of the Fire Division has consisted of 18% or more minority individuals." It went further to state that "[t]he critical date herein is August 7, 1988, when plaintiffs sat for the examination. On that date, the goal (of 18%) had been reached." The district court then analyzed the hiring provisions of consent decree and found the following:

> Somehow the simple English words of paragraph 23 have been construed to be an addendum to paragraph 22. If so, it is completely inconsistent with the "goal" of 18%. There is no language in the Consent decree requiring the fire division at any time to consist of 40% minority persons . . . The Court can only construe the existing Consent Decree *in haec verbae* lists a maximum goal of 18%. There is no dispute among the parties that 18% had been achieved prior to the date on which these plaintiffs took the entrance examination.

Based on these findings, the district court stated that its holding was a "limited" one that "finds only that the goal

of the Consent decree as it relates to hiring has been achieved," and ostensibly dissolved only paragraph 22 of the consent decree.

We believe that the district court's "limited" order has misconstrued the essence of the affirmative action plan as envisioned by the parties. First, this Court finds no "maximum" goal stated in paragraph 22 of the Consent decree. We find only a target of "at least 18% that will not support any inference of racial discrimination in hiring." Furthermore, the language of paragraph 23 is not only congruous with the language of paragraph 22, but also sets forth the base formula which the City should use to ultimately attain the decree's goal of a balanced workforce in the City's Fire Division.

Furthermore, the district court failed to follow the dictates of *Board of Educ. of Oklahoma City Public Schools v. Dowell*, 111 S. Ct. 630 (1991), and *Youngblood v. Dalzell*, 925 F2d 954 (6th Cir. 1991) In *Dowell*, the Supreme Court was faced with a school desegregation consent decree and its proper dissolution. The Court stated that the proper inquiry into the continued effectiveness of the consent decree was "whether the Board has complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable". *Dowell*, 111 S. Ct. at 638.

With regard to the overall interpretation of an adjudication of claims under this particular consent decree, this Circuit, in *Youngblood* stated:

> A key provision of the consent decree in this case is paragraph 34, governing continuing

jurisdiction of the court and duration of the consent decree. That paragraph provides that the court's jurisdiction over the case may be terminated when the defendants are shown to be in "compliance with [its] terms," and that the decree may be dissolved "after the objectives of this decree have been achieved." Relevant to the former clause, *this circuit has held that a district court may not close a case governed by a consent decree without addressing pending claims that the defendants have violated the decree. United States v. City of Cincinnati,* 771 F.2d 161, 168-69 (6th Cir. 1985). Relevant to the latter clause, the Supreme Court has held in the school desegregation context that where the defendant school district has achieved one of the objectives of a multi-faceted desegregation order, the district court's remedial authority with regard to that aspect of the school system is at an end and that part of the injunction must be dissolved. *Pasadena City Bd. of Educ. v. Spangler,* 427 U.S. 424, 436-37, 440 (1976).

Youngblood, 925 F.2d at 957-58 (emphasis added). The *Youngblood* Court further stated:

If the district court determines that in spite of the defendant's failure to achieve the specific terms of the consent decree in a timely fashion, the goal which the 18 percent requirement sought to achieve – the eradication of discriminatory hiring – has been achieved, then the court may dissolve that portion of the decree. In making this determination, the court must consider the argument in the plaintiffs' Motion to Modify that in the years since 1974, the racial composition of the City's work force has so changed that 18 percent minority hiring goal no longer is sufficient to dispel the inference that

> the City's hiring practices are discriminatory. Paragraph 34 of the consent decree allows the court to modify or amend the terms of the decree, and under *City of Cincinnati* the court's failure to consider such arguments would be erroneous. We emphasize again that this probing of the underlying goal of the decree is necessary before the decree is dissolved because . . . here the specific terms of the decree were not achieved by the deadline in the agreement and allegations of noncompliance have been raised. . . . *[T]he district court must look beyond the numerical term to the goal which that hiring requirement was designed to achieve. In deciding whether to close the case and dissolve the decree in its entirety, the district court must similarly consider the goal of negating any inferences of lawful discrimination in the recruitment, testing, and promotion of minorities in these areas, no specific numerical terms were established by the consent decree.*
>
> *Before the district court dissolves the decree, it must determine that the goals of the consent decree have been achieved and must consider all objections to such dissolution.*

Id. at 961 (emphasis added).

In light of the guidance given by the *Youngblood* Court, we agree with the City and Intervenors that the district court erroneously terminated the 18% hiring goal of the consent decree. The ostensibly "limited" district court order has far reaching consequences for the effectiveness of the remainder of the decree's provisions. Indeed, laying aside the possibility that the decree's hiring goal warrants modification, the stated hiring goal

directly impacts the promotional goals within the decree. Without a commitment to hiring a sufficient number of minority applicants, the pool of minority hirees from which the department could draw commanders and other supervisors will be diminished. The essence of paragraph 27, "to achieve a goal of work force composition which negates any inference of an unlawfully discriminatory promotion policy based on race," would undoubtedly be undermined by the court order and may open the City to further litigation. We find that the numerical goals in paragraph 22, to which the parties to the Consent decree agreed, are the lynchpin for accomplishing the overall objectives of the decree, and those goals cannot be dissolved lightly and without due consideration as to how the other provisions of the decree will remain effective.

Moreover, the *Youngblood* Court specifically stated that the consent decree must remain in effect until all of the objections to its dissolution have been considered and resolved. *See Youngblood*, 925 F.2d at 961. The Intervenors have asserted discrimination actions based on the City's hiring practices during the relevant period. *See Jansen v. City of Cincinnati*, 904 F.2d 336 (1990) (granting black firefighters the right to intervene). By neglecting these claims of discrimination, the district court has erroneously failed to determine "whether the vestiges of past discrimination had (indeed) been eliminated to the extent practicable." *See Board of Educ. of Oklahoma City Public Schools v. Dowell*, 111 S. Ct. 630, 638 (1991). The dissolution of the 18% hiring goal without addressing the Intervenors complaints is contrary to both the Supreme Court's overarching principle for evaluating consent

decrees announced in *Dowell* and this court's clear mandate in *Youngblood*.

III.

While we recognize that a consent decree operating in perpetuity may not be the most effective way to eradicate the evils of discrimination in the municipal workplace, we must remain true to the wording and intent of such decrees, until their goals are met. As a footnote, we also observe that the consent decree specifically provides for its own dissolution upon a proper motion by the defendant parties to the decree and that the city has not yet moved the court for dissolution of any portion of the decree. Given the intrinsic bond between the hiring and promotion goals of the consent decree and the district court's failure to address the Intervenor's claims with regard to the City's recent hiring practices, we must VACATE the district court's order and REMAND the case to the district court for proceedings consistent with this opinion.[2]

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[2] In light of the disposition of this case, this Court makes no determination as to the relief granted to the plaintiffs by the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TILFORD YOUNGBLOOD, et. al., Plaintiffs	)	Civil Action No. 8774
v.	)	
JOHN DALZELL, et. al, Defendants	)	CONSENT DECREE

I. Preliminary Statement

1. On March 30, 1973, Plaintiffs Tilford Youngblood and Ralph Nichols, on their own behalf and on behalf of all other persons similarly situated, filed their Complaint herein alleging that the Defendants were engaged in a pattern or practice of discrimination based on race in recruiting, testing, selecting, and hiring applicants for the position of fire recruit and in the promotion of firemen in the Division of Fire, Department of Safety of the City of Cincinnati, Ohio, in violation of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. §§1981 and 1983, Article I, §2 of the Ohio Constitution, and Chapter 4112 of the Ohio Revised Code.

2. Plaintiffs seek declaratory and injunctive relief to permanently enjoin Defendants from engaging in racially discriminatory employment practices or policies in the recruiting, testing, selecting, and hiring of fire recruits and in the promotion of firemen.

3. Plaintiffs further seek affirmative relief to remedy the effects of past racially discriminatory employment practices in the Division of Fire.

4. On June 25, 1973, the Court permitted the Ohio Civil Rights Commission to intervene in this suit as a Party-Plaintiff pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.

5. The Defendants deny that they have heretofore engaged in any pattern or practice of discrimination in recruiting, testing, selecting, and hiring fire recruits or in promoting firemen on the basis of race, but realize that certain past practices of the Division of Fire, Department of Safety and the Civil Service Commission of the City of Cincinnati, Ohio, may give rise to an inference that such pattern or practice may have occurred. For the purpose of avoiding any such inference, the Defendants have heretofore taken certain steps and promulgated certain policies intended to increase the availability and selection of qualified minority applicants for employment and promotion, and, for the same purpose and with the same intent, and being desirous of implementing a solution to the subject matter of this action without the expense of litigation, are now willing to agree to the entry of a Consent Decree providing for additional measures to be taken.

6. All parties mutually waive a hearing and findings of fact and conclusions of law on all issues and agree to the form of this Decree, and the Court having jurisdiction of the parties and subject matter of this action pursuant to 28 U.S.C. §§1343(3) and (4), it is mutually agreed that this Consent Decree shall be entered as a final binding order in this action from which no appeal shall be taken. Entry of this Consent Decree shall not constitute an admission by Defendants of any violation of law.

7. Definitions: "Minorities" as used in this order means black persons as set forth in the Complaint, Paragraphs 4,5 and 6. "The Parties" as used in this order means the Plaintiffs, the Defendants, and the Intervenors to this action. "Test" as used in this order means those selection procedures defined in 29 C.F.R. §1607.1 *et seq.* (1973).

II. Order

Therefore it is hereby ORDERED, ADJUDGED, and DECREED:

8. That the Defendants, their officers, agents, employees, successors, and all persons in active concert or participation with them are hereby permanently ENJOINED AND RESTRAINED from any act or practice which has the purpose or effect of wrongfully discriminating against any minority applicant or potential applicant, or any minority employee of, the Division of Fire, because of such individual's race, with respect to recruiting, testing, selecting, hiring, training, conditions of employment, and promotions and from engaging in any other acts or practices which have the purpose or effect of denying equal employment opportunities to minorities. In case of disagreement between the parties as to whether any act or practice has the purpose or effect of wrongfully discriminating against any minority applicant, potential applicant or minority employee of the Division of Fire, because of such individual's race, the matter may be submitted by the parties or any one of them to the Court for resolution.

III. Additional Relief

It is further ORDERED, ADJUDGED, and DECREED as follows:

Affected Class

9. This action is properly maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. Members of the class are all minority persons who have applied since January 1, 1968, or who might hereafter apply for the position of fire recruit in the Division of Fire and all minority firemen currently employed by the Division of Fire who have sought since January 1, 1968, or might hereafter seek promotion within the Division of Fire.

Recruitment

10. Defendants shall adopt and proceed to implement as promptly as possible the measures set forth in the recruitment section of its "City of Cincinnati Affirmative Action Plan" adopted on June 20, 1973. The purpose of said program will be to significantly increase the number of minority applicants for employment by the Division of Fire, Department of Safety of the City of Cincinnati, Ohio, in order to attain the employment objectives set forth herein.

11. Defendants' affirmative action recruiting program to increase the number of minority applicants for the position of fire recruit shall include but not be limited to the following:

a. Defendants will undertake to disseminate to the largest possible number of prospective minority applicants the Defendants' goals of increasing minority employment at all levels of the Division of Fire. This will include the terms of this Decree and the Division of Fire's policy of non-discrimination.

b. Defendants will establish information and application centers in predominantly minority neighborhoods during recruiting periods.

c. Defendants will appoint a special recruiting officer, with pay and rank commensurate with his responsibilities, from among minority persons currently employed in the Division of Fire. The special recruiting officer will report directly to the Chief or an Assistant Chief designated by the Chief. The special recruiting officer shall, subject to the authority of the Chief or designated Assistant Chief, be in charge of recruiting efforts in the minority community.

d. Defendants will intensify newspaper and radio advertising in order to recruit minority persons, and Defendants will continue to utilize a mobile van staffed with minority members of the Division of Fire for the purposes of recruiting, publicizing examinations, and answering questions from potential applicants in minority neighborhoods.

e. It is agreed by all parties that recruitment activities shall not interfere with the Division of Fire's primary duties of preventing and extinguishing fires.

Minimum Qualifications for
Hiring Fire Recruits

12. In the appointment of fire recruits and in seeking to achieve the goals established herein in accordance with Paragraphs 21 through 26, all applicants for employment as fire recruits with the Division of Fire shall be considered to be qualified if they meet the minimum specifications set out below, perform satisfactorily on written and oral examinations, which are valid or non-discriminatory as set forth in Paragraphs 16 and 17, below, and if they receive satisfactory ratings under the additional elements of the selection process identified in Paragraphs 18, 19, and 20, below.

13. The following shall constitute the minimum qualifications for applicants:

a. Age 18 to 30 at the time of appointment, except that minority persons who have previously taken the examination for fire recruit since January 1, 1968, and who were not appointed, and all minority applicants who hereafter take the examination for fire recruit for a period of three (3) years after entry of this Decree, will be eligible for appointment if they have not yet attained the age of 35 in order to permit minority persons over the age of 30 who may have been wrongfully discriminated against in the past to qualify as fire recruits.

b. Possession of a valid Ohio Drivers License at the time of appointment.

c. United States citizenship, Ohio residence and Hamilton County residence at the time of appointment.

d. Passage of a written examination as permitted by paragraphs 16 and 17, below, and passage of an oral examination as permitted by paragraph 18.

e. Passage of the physical examination, visual acuity examination, and agility examination.

f. Satisfactory rating on a background investigation in accordance with Paragraph 20, below.

g. Suitable educational background necessary for satisfactory job performance. A high school diploma or equivalent shall meet this requirement, provided applicants who lack a diploma will not be disqualified if they can present evidence of suitable educational skills acquired in other ways. Defendants shall not require any candidate to possess any qualifications which the applicant could obtain through training at the Fire College during his probationary period.

14. Defendants shall not ask for arrest records on the application for the position of fire recruit or in any background investigation of potential fire recruits and shall not consider arrests as a criterion in the selection of fire recruits. Felony and misdemeanor convictions shall not be considered as criteria of employment unless Defendants can demonstrate that the conviction is related to job performance. Names of applicants rejected for employment on the basis of criminal convictions shall be furnished in writing to Plaintiffs.

Testing Procedures

15. In determining the availability of qualified applicants for the position of fire recruit, Defendants may

administer a written test or tests only as permitted by Paragraphs 16 and 17, below, and may not rely upon any other written tests in considering applicants for fire recruit.

16. Defendants shall not use a written test for the selection of applicants for employment by the Division of Fire unless such test has no disproportionate adverse impact upon minority persons or has been validated in accordance with the Equal Employment Opportunity Commission's current "Guidelines on Employee Selection Procedures," 29 C.F.R. §1607.1 *et seq.* If Defendants desire to use a written test which they believe has no disproportionate adverse impact on minority persons, Defendants shall present to Plaintiffs prior to the administration of said test whatever evidence is available showing the absence of said adverse impact for the test in question. If the parties are unable to agree, the question of whether such test is without disproportionate adverse impact may be submitted to the Court for resolution. Tests which have a disproportionate adverse impact or an unknown impact on minority persons may be administered to applicants for the position of fire recruit only for the purpose of determining the validity of such tests as selection devices; they may not be used as selection devices.

17. Until Defendants develop or use a written test validated in accordance with Paragraph 16, above, Defendants may continue to utilize the written examination administered on April 21, 1973, in order to achieve the work force composition set out in Paragraph 22, below. The score received by applicants on this written examination shall be combined with the score received on the oral examination in determining the selection of applicants.

Other Selection Procedures

18. Subject to provisions of this paragraph and Paragraph 17, Defendants may continue to utilize the oral examination administered in April, 1973 in the selection of fire recruits. If the oral examination is conducted by a single interviewer, the interviewer of minority applicants shall also be a minority person. If the oral examination is conducted by a panel of interviewers, at least one-third of the panel shall be composed of minority persons. In no case will a minority group applicant be interviewed solely by white persons.

19. Subject to the provisions of this paragraph, Defendants may continue to utilize the current physical examination, agility examination, and visual acuity examination. If the test or tests utilized by Defendants have a disproportionately adverse impact on minority applicants, Defendants shall review such tests to determine whether the items which comprise them are reasonably related to successful job performance and whether items could be substituted on such tests which would be equally predictive of successful job performance while having less adverse impact on minority candidates. Plaintiffs may apply to the Court for determination as to whether continued use of the test or tests constitutes unlawful discrimination.

20. Subject to the provisions of this paragraph, Defendants may continue to utilize background investigations. Defendants shall review the form of the background investigations to determine whether the items which comprise it are reasonably related to successful job performance and whether said items have an adverse

impact on minority applicants. If the background investigation currently utilized has a disproportionately adverse impact on minority group applicants, the Plaintiffs may apply to the Court for determination as to whether continued use of the background investigation constitutes unlawful discrimination. In the absence of such a determination, the Defendants may continue to use background investigations insofar as no information concerning arrest records is solicited or recorded by the investigator, information concerning criminal convictions is evaluated in compliance with Paragraph 14, above, and the background of minority applicants is investigated and said applicants are interviewed by at least one person of the same race as the applicant.

Hiring

21. Defendants shall not appoint fire recruits from any existing certification list or ranking of available applicants nor engage in any other practice or policy which has the purpose or effect of discriminating against any minority applicant, potential applicant, or minority employee or perpetuating the effects of any past discrimination based on race; except that Defendants may appoint, subject to the provisions of Paragraph 26, within sixty (60) days after the date of entry of this Decree, up to twenty-five (25) fire recruits, at least twenty-five percent (25%) of whom are minority persons. Prior to appointment of this fire recruit class, Defendants shall offer participants in the Model Cities Fire Cadet Program who did not take the April, 1973 Civil Service examinations the opportunity to be tested by a selection procedure comparable to that used in April, 1973, for the position of

fire recruit. Results of said test shall be merged with the existing certification list derived from the April, 1973 Civil Service examinations, and Defendants shall appoint the fire recruit class referred to in this paragraph from that list.

22. Subject to the availability of qualified applicants, Defendants shall adopt and seek to achieve a goal of hiring sufficient numbers of qualified minority persons to achieve a work force composition which will not support any inference of racial discrimination in hiring. Such goal shall be deemed to have been achieved when at least eighteen (18) percent of the Division of Fire personnel of the City of Cincinnati are minority persons. In order to reach this goal, Defendants shall adopt and seek to achieve a goal of hiring sufficient minority persons so that the personnel in the Division of Fire will be:

4.2%	Minority	by	December 31, 1974
6%	Minority	by	December 31, 1975
8%	Minority	by	December 31, 1976
10.5%	Minority	by	December 31, 1977
13%	Minority	by	December 31, 1978
15.5%	Minority	by	December 31, 1979
18%	Minority	by	December 31, 1980

23. Defendants shall be deemed to have sought to achieve each stage of the work force composition goals when and as the above percentages of Fire Division personnel are minority persons either on or within one month before or after the above dates; provided, however, that Defendants shall be deemed to have sought to achieve each stage of the work composition goals in good

faith if at least forty (40) percent of the total fire recruit class for any given year consists of minority persons.

24. Should Defendants fail to achieve the goal set out for any given year, Defendants shall file a report within thirty (30) days to the Court, with service upon all parties, setting forth all facts relied upon to explain the failure to achieve such goal. Persons not completing the probationary period as fire recruit and other persons leaving the Division of Fire at any time shall, as of the date of their failure to complete probation or their departure, no longer be included; provided that such failures or departures shall be considered in determining the availability of qualified applicants.

25. In no event shall the Division of Fire be required to hire a person as a fire recruit who is not qualified. Scores on selection procedures which have not been validated in accordance with the EEOC guidelines or scores on validated standards which are not sufficiently different as to predict a significant difference in job performance shall not be used in determining the qualifications of applicants. A valid ranking of all applicants for the position of fire recruit is not prohibited by this paragraph.

26. Within Fifteen (15) days after the appointment of a fire recruit class pursuant to Paragraph 21, above, Defendants shall offer all identifiable minority persons who have applied for the position of fire recruit since January 1, 1968, but who were not hired, the opportunity to attend Fire College training sessions given the fire recruit class appointed pursuant to Paragraph 21, above. Plaintiffs shall furnish the names and addresses of these

persons, and Defendants shall mail to each, postage prepaid, an invitation to attend Fire College training sessions, describing the program to be implemented as provided by this paragraph. Any costs of this compensatory training will be borne by Defendants, and Defendants shall compensate each minority person so trained at the minimum wage level. Defendants shall provide each minority person who successfully completes such training with a numerical credit sufficient to enable said persons to compete on equal terms with all other prospective candidates on the next ensuing fire recruit examination. The minority persons receiving compensatory training pursuant to this paragraph shall be limited to victims of past alleged discriminatory practices and shall not exceed thirty (30) persons.

Promotions

27. Defendants shall use a system for promoting qualified minority persons within the ranks of the Division of Fire to achieve a goal of a work force composition which negates any inference of an unlawfully discriminatory promotion policy based on race.

Records

28. Defendants shall maintain, during the period of this Decree, the records listed below:

a. All applications for the position of fire recruit, including identification by race on each application.

b. All records which reflect tests results, whether written or practical, for both initial

appointment and promotion into positions with the Division of Fire, and all ratings sheets used in connection with selection for such initial appointment and promotion.

c. All records which reflect the results of any other selection procedures used in the hiring or promotion of persons for positions in the Division of Fire, such as background investigations.

d. All written communications between Defendants and applicants for both initial appointment and promotion in the Division of Fire.

e. All eligibility lists utilized for both initial appointment and promotion.

In the event of any dispute over any of the items included in this paragraph, the dispute may be resolved by the Court.

29. Within thirty (30) days of entry of this Decree, Defendants shall submit to Plaintiffs an alphabetical list of its then current Division of Fire personnel indicating for each person his name, address, race, place of assignment, detail or unit, date of appointment, and rank. Every six (6) months thereafter, for the period of this Decree, Defendants shall submit both an updated version of the above list and a report indicating by race the number of personnel at each level in the Division of Fire.

30. Defendants shall not discriminate or retaliate in any manner against any employee or applicant for employment who has furnished information or participated in any respect in the investigation of Defendants' employment practices in connection with this action, it being understood that the foregoing does not constitute

any admission or finding that Defendants have ever engaged in such practices.

Individual Relief

31. Within thirty (30) days of the date of entry of this Decree, Defendants shall offer Plaintiff Ralph Nichols a position as fire recruit with the Division of Fire, provided he passes the physical examination. For purposes of appropriate pay scale, Plaintiff Nichols' seniority date shall be October 26, 1969.

Damages

32. The claims of Plaintiffs for damages are hereby dismissed with prejudice.

Costs

33. The parties reserve the right to move for an award of costs. The parties reserve the right to oppose this request. The parties agree that any dispute of any award of costs will not impinge on the spirit or effectiveness of this Decree, nor on their compliance with it.

Continuing Jurisdiction of the Court

34. The Court will retain continuing jurisdiction of this action for such further relief or other orders as may be appropriate pending a showing of compliance with the terms of this Decree. Upon a showing of good cause, and upon due notice to all parties, or upon agreement of the parties, any provision of this Decree may be amended or

modified by an order of this Court or any Court of competent jurisdiction. At any time after the objectives of this Decree have been achieved, the Defendants may move this Court, on due notice, for dissolution of the Decree.

Entered at Cincinnati, Ohio, this 7th day of May, 1974.

/s/ David S. Porter
UNITED STATES
DISTRICT JUDGE

APPROVED AS TO FORM
AND CONTENT:

WILLIAM J. BROWN
Attorney General of Ohio

/s/ Diane R. Liff
DIANE R. LIFF – TRIAL
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Assistant Attorney
General
Deputy Chief, Civil
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/s/ Andrew J. Ruzicho/
DAL
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/s/ Thomas A. Luebbers
THOMAS A.
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ATTORNEY FOR
PLAINTIFFS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TILFORD YOUNGBLOOD, et al. Plaintiffs -vs- JOHN DALZELL, et al. Defendants	:	CIVIL ACTION NO. 8774 ENTRY MODIFYING CONSENT DECREE J. Porter (Filed Apr. 9, 1981)

For good cause shown and by agreement of counsel for all parties, the Consent Decree entered in this cause on May 7, 1974, is hereby amended in the following respect, and in these respects only; all other terms and conditions of said Consent Decree to remain in full force and effect.

Paragraph No. 22 shall be amended to read as follows:

> "22. Subject to the availability of qualified applicants, Defendants shall adopt and seek to achieve a goal of hiring sufficient numbers of qualified minority persons to achieve a work force composition which will not support any inference of racial discrimination in hiring. Such goal shall be deemed to have been achieved when at least eighteen (18) percent of the Division of Fire Personnel of the City of Cincinnati are minority persons. In order to reach this goal, Defendants shall adopt and seek to achieve a goal of hiring sufficient minority persons so that the personnel in the Division of Fire will be 11%

minority by December 31, 1981 and will increase by at lest two percent each year thereafter until the minority percentage is 18% of the sworn force."

Entered at Cincinnati, Ohio this 9th day of April, 1981.

/s/ David S. Porter
United States District Judge

Approved as to form and content:

William J. Brown
Attorney General of Ohio

By: /s/ Donald W. Conley
Donald W. Conley
Assistant Attorney General
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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TIMOTHY JANSEN, et al., Plaintiffs,	**CASE NO.**
vs.	RESPONSE TO **FIRST SET OF REQUESTS FOR ADMISSIONS FROM PLAINTIFFS TO DEFENDANTS**
THE CITY OF CINCINNATI, et al., Defendants.	

Pursuant to Ohio Civil Rule 34, plaintiffs request that defendants produce, within twenty-eight (28) days of the service hereof, the following described documents for inspection and copying at the office of the requesting party's trial attorney, William S. Wyler, Schwartz, Manes & Ruby, 2900 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202-3090, or at such other place agreed upon between counsel. In lieu of such production, copies of the documents requested may be sent to the above address within the same twenty-eight (28) day period.

DOCUMENTS AND INSTRUCTIONS

A. The words "document" or "documents" are used in the comprehensive sense, and shall include, without limitation, any written, printed, recorded or graphic matter, photographic matter or sound reproduction, however produced or reproduced, of any type or nature whatsoever, including drafts and copies not identical to the original, or including, without limitation, any and all written correspondence, letters, telegrams, agreements,

* * *

14. The Consent Decree did not set forth a mandatory hiring quota of 40% minorities to 60% non-minorities.

RESPONSE:

Admitted. See paragraphs 22 and 23 of the Consent Decree wherein the 40% minority hiring ratio is described as evidence of a good faith effort to achieve goals for minority hiring in the Fire Division.

15. Ohio Revised Code § 124.01 et seq. does not authorize the dividing of open eligible lists for the fire division by race.

RESPONSE:

Admitted. Ohio Revised Code Section 124.01, et seq. does not address dividing of open eligible lists for the Fire Division by race; however, the Consent Decree does authorize that division.

16. The Charter of the City of Cincinnati does not authorize the dividing of open eligible lists for the fire division by race.

RESPONSE:

Admitted. The Charter of the City of Cincinnati does not address dividing open eligible lists for the Fire Division by race; however, the Consent Decree does authorize that division.

17. The Consent Decree does not require defendants to divide eligible hiring lists, established under the Civil Service System, based upon race.

RESPONSE:

Admitted. However, the Consent Decree does authorize that division.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TIMOTHY JANSEN, et al., Plaintiffs,	**CASE NO. C-1-89-079**
vs.	RESPONSE TO
THE CITY OF CINCINNATI, et al., Defendants.	**FIRST SET OF INTERROGATORIES TO DEFENDANTS**

Pursuant to Rules 33 and 34 of the Rules of Civil Procedure, the Plaintiffs hereby submit the following interrogatories and request for the production of documents to the Defendants. These questions must be answered by the Defendants, under oath, within thirty (30) days after service.

INSTRUCTIONS FOR INTERROGATORIES

1. Each interrogatory shall be answered separately and fully, in writing under oath by the Defendants and the Defendants shall seasonably supplement and correct the responses pursuant to Rule 26(E) as Defendant obtain additional information between the time the answers are served and the time of trial.

2. A separate answer should be furnished for each interrogatory or portion of an interrogatory although, where the contest permits, an interrogatory can be answered by reference to a response furnished for another interrogatory, but this should not be interpreted

to narrow or limit the normal interpretation placed upon each individual interrogatory.

* * *

12. Please set forth, specifically, each and every section of the Consent Decree which requires a quota for hiring 40% minorities to 60% non-minorities.

RESPONSE:

The Consent Decree does not require a quota for hiring 40% minorities to 60% nonminorities. See paragraphs 22 and 23 of the Consent Decree wherein the 40% minority hiring ratio is described as evidence of a good faith effort to achieve goals for minority hiring in the Fire Division.

13. State the date on which the overall staffing level of the city fire division consisted of 18% or more minorities.

RESPONSE:

The approximate date on which the overall staffing level of the City Fire Division consisted of 18% or more minorities was December 31, 1986.

14. Please state the percentage of minorities making up the city fire division on the date that the recruit class or classes from list 87-80 was sworn in.

RESPONSE:

The recruit class from list 87-80 was hired on August 7, 1988. The percentage of minorities making up the City Fire Division was 18.6% prior to hiring the recruit class from list 87-80.

15. Please set forth, specifically, each portion of the Consent Decree which requires defendants to set aside and not follow Ohio Civil Service law.

RESPONSE:

The Consent Decree in total is a court order authorizing defendants to follow its terms in lieu of Ohio Civil Service law.

16. Absent a court order, is the City of Cincinnati generally required to follow the law set forth in the Ohio Revised Code, as the basis for operating its own Civil Service system.

RESPONSE:

Yes.

17. Please state, specifically, where in the Consent Decree the Cincinnati fire division or more generally, the City of Cincinnati, was found to have engaged in a concerted effort or pattern of racial discrimination.

RESPONSE:

The Consent Decree does not state "the Cincinnati Fire Division or . . . the City of Cincinnati was found to have engaged in a concerted effort or pattern of racial discrimination." See paragraph 5 of the Consent Decree.

18. In the Consent Decree, does the City of Cincinnati deny that it has unfairly discriminated on the basis of race?

RESPONSE:

Yes. See paragraph 5 of the Consent Decree.

19. Who determined that the fire recruit class would be 60% majority members and 40% minority members.

RESPONSE:

Those persons signing the Consent Decree.

20. Will you, without need of a motion to produce, please provide all data, memoranda, and documentation within City Hall, addressing the issue of, or having anything to do with, the recruit class sworn in from list 87-80, including memoranda from or to the fire division or between people in the executive offices or the personnel department, particularly with regard to the racial makeup of such class, prior to its swearing in.

RESPONSE:

To date, no such documents have been found. Investigation is continuing to determine information responsive to this Interrogatory.

/s/ William S. Wyler
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(513) 579-1414
Attorney for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION (CINCINNATI)**

TIMOTHY JANSEN, et. al., Plaintiffs,	**CASE NO. C-1-90-134 (Rubin, J.) (Magistrate Sherman)**
vs.	RESPONSE TO
THE CITY OF CINCINNATI, et. al., Defendants.	**THIRD SET OF INTERROGATORIES TO DEFENDANTS FROM PLAINTIFFS**

* * *

INTERROGATORIES

1. With regard to the examination processes which created the promotional eligible lists upon which the consolidated plaintiffs' names were placed in the within litigation, did the City of Cincinnati use a validated examination process in accordance with the Equal Employment Opportunity Commission's current "guidelines on employee selection procedures".

Yes.

2. If the answer set forth above is in the affirmative, please state as specifically as possible what process defendant city followed to assure that said examination complied with the Equal Employment Opportunity Commission (EEOC) current guidelines on employee selection procedures.

A job analysis was conducted by the test company to determine the necessary knowledges,

skills and abilities necessary to perform the job of Firefighter. The test was constructed to tap those minimum qualifications. Additionally, a transportability study was conducted to insure that the test was also valid for the Cincinnati Fire Division.

3. Since the Consent Decree in *Youngblood v. Dalzel* (sic) was originally entered into and filed on May 7, 1974, please set forth each and every hiring examination for fire recruits WHICH DID NOT use the then current Equal Employment Opportunity Commission guidelines on employee selection procedures.

None.

4. For any such examinations, set forth in the answer immediately above, please state why such procedures and guidelines were not followed and what action was undertaken to assure that the examinations would be race neutral.

N/A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TIMOTHY JANSEN, ET AL, Plaintiffs,	:	
vs.	:	Civil Action
CITY OF CINCINNATI, ET AL, Defendants.	:	C-1-89-079

The deposition of CAROL CALLAHAN, Witness herein, taken as on Cross Examination by the Plaintiff, pursuant to the Federal Rules of Civil Procedure, and notice issued to take deposition at the offices of the City Solicitor, Room 214 City Hall, Cincinnati, Ohio 45202 on Monday, December 17, 1990, at 2:00 p.m., before Vera L. Draper, a court reporter and Notary Public.

* * *

[p. 5] Q. I want to expand a bit on your answers to the intervenors, and we don't have to - Well, we can mark it. Let's mark this as Callahan Deposition Exhibit No. 1.

(Callahan Exhibit No. 1 was marked for identification.)

MR. WYLER: Were you referring to the ones August 10th, 1990?

MR. SCHRIDER: Yes, the answers.

Q. Let's take a look at those, Miss Callahan. Let's go to your answer to No. 3 which is on pages 5 and 6. Now do you see at the bottom where it starts 3-B and you are being asked to state whether the examination and examination procedures are culturally biased in the sense that black persons are likely to do less well than white persons because of their different cultural and educational background. You see that? And the answer was, "No study has been conducted."

Let me stop there for a second. In answering these interrogatories, I take it that your answer went to both the 1988 and the 1989 exam; is that correct?

A. Right.

MR. WYLER: At this point I would like to impose an objection to this line

* * *

[p. 27] goal.

Q. When you say you try to meet that goal, you basically set aside the rankings on the Civil Service exam to do it; correct?

A. Correct.

Q. Where, do you know of any language in the consent decree that authorizes the City to do that?

MR. VOLLMAN: Just so it is timely, object, calls for a legal conclusion. You may answer.

A. No.

Q. In fact, the Ohio Revised Code mandates that individuals shall be placed on an eligible list in the order of their relative excellence, is that correct?

A. Correct.

Q. And orders that they be hired in that order pending the Rule 3?

A. Rule 3?

Q. In all of my discussions about hiring, we are assuming Rule 3; in other words, we are talking about certification to the fire chief for hiring under the Rule of 3?

A. Correct.

* * *

[p. 31] Q. I am talking on average.

A. On average, one out of every 10 make it all the way through from the written test.

Q. Now do you happen to know whether those averages hold true for the three lists we are involved in here?

A. Pretty much so.

Q. Without being specific?

A. Yes.

Q. That's about right?

A. Uh-huh.

Q. Okay. Can you tell me when this decree will end? When in your opinion as one of the people the City

relies on, when do you see that it would have been met in its terms?

MR. VOLLMAN: Objection as to her opinion. She is testifying as a fact witness, I don't know what her opinion has to do with it.

A. I don't know.

Q. You don't know?

A. No.

Q. Do you know of anyone in the City administration who does know?

A. It is my understanding that for it

* * *

[p. 37] you might be the best at the physical ability or more proficient at other aspects of the job.

Q. But you stated earlier, in your earlier testimony that you thought that there would be a difference between those ranked near the top of the list and those, say, a hundred down on the list?

A. There is a difference in proficiency on the written test. If I got 95 and you got 96 that wouldn't be indicative that you were smarter than I at this part of the test.

Q. If you got 95 and I got 83?

A. I would show more proficiency on this component of the test, yes, I would say that.

Q. Is it not correct, with the exception of the City's interpretation of the consent decree, the Ohio Revised

Code would still require the City to hire off a single list by relative excellence based on the written exam; is that correct?

MR. VOLLMAN: Objection. What the code requires.

A. No, it wouldn't.

Q. It wouldn't?

A. We could have an oral component to that, it would not be just a written test. Or we could choose to give points for the physical ability test or

* * *

AMENDMENT 14

SECTION 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives-Power to reduce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. Disqualification to hold office.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. Public debt not to be questioned – Debts of the Confederacy and claims not to be paid

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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42 U.S.C. § 1983 – CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 124.26 Eligible Lists; Veteran's Preference; Existing Employees Who Pass Examination

(A) Except as provided in divisions (B) and (C) of this section, from the returns of the examinations the director of administrative services shall prepare an eligible list of the persons whose general average standing upon examinations for such grade or class is not less than the minimum fixed by the rules of the director, and who are otherwise eligible; and such persons shall take rank upon the eligible list as candidates in the order of their relative excellence as determined by the examination without reference to priority of the time of examination. In the event two or more applicants receive the same mark in an open competitive examination, priority in the time of filing the application with the director shall determine the order in which their names shall be placed on the eligible list; provided, that applicants eligible for veteran's preference under section 124.23 of the Revised Code shall receive priority in rank on the eligible list over nonveterans on the list with a rating equal to that of the veteran. Ties among veterans shall be decided by priority of filing the application. In the event of two or more applicants receiving the same mark on a promotional examination, seniority shall determine the order in which their names shall be placed on the eligible list. The term of eligibility of each list shall be fixed by the director at not less than one nor more than two years. When an eligible list is reduced to three names or less, a new list may be prepared. The director may consolidate two or more eligible lists of the same kind by the rearranging of eligibles named therein, according to their grades.

§ 124.27 Appointments; Certified And Provisional; Probationary Period

The head of a department, office, or institution, in which a position in the classified service is the [sic] be filled, shall notify the director of administrative services of the fact, and the director shall, except as otherwise provided in this section and sections 124.30 and 124.31 of the Revised Code, certify to the appointing authority the names and addressees of the three candidates standing highest on the eligible list for the class or grade to which the position belongs; provided, that the director may certify less than three names if three names are not available. When less than three names are certified to an appointing authority, appointment from that list shall not be mandatory. When a position in the classified service in the department of mental health or the department of mental retardation and developmental disabilities is to be filled, the director of administrative services shall make such certification to the appointing authority within seven working days of the date the eligible list is requested.

The appointing authority shall notify the director of such position to be filled, and he shall fill such position by appointment of one of the three person certified to him. If more than one position is to be filled, the director of administrative services may certify a group of names for the eligible list and the appointing authority shall appoint in the following manner: Beginning at the top of the list, each time a selection is made it must be from one of the first three candidates remaining on the list who is willing to accept consideration for the position. If an eligible list becomes exhausted, and until a new list can be created, or when no eligible list for such position

exists, names may be certified from eligible lists most appropriate for the group or class in which the position to be filled is classified. A person certified from an eligible list more than three times to the same appointing authority for the same or similar positions, may be omitted from future certification to such appointing authority, provided that certification for a temporary appointment shall not be counted as one of such certifications. Every soldier, sailor, marine, coast guardsman, member of the auxiliary corps as established by congress, member of the army nurse corps, or navy nurse corps, or red cross nurse who has served in the army, navy, or hospital service of the United States, and such other military service as is designated by congress in the war with Spain, including the Philippines insurrection and the Chinese relief expedition, or from April 21, 1898, to July 4, 1902, World War I, World War II, or during the period beginning May 1, 1949, and lasting so long as the armed forces of the United States are engaged in armed conflict or occupation duty, or the selective service or similar conscriptive acts are in effect in the United States, whichever is the later date, who has been honorably discharged or separated under honorable conditions therefrom, and is a resident of Ohio, and whose name is on the eligible list for a position, shall be entitled to preference in original appointments to any such competitive position in the civil service of the state and the civil divisions thereof, over all persons eligible for such appointments and standing on the list therefor, with a rating equal to that of each such person. Appointments to all positions in the classified service, that are not filled by promotion, transfer, or reduction, as provided in sections 124.01 to 124.64 of the Revised Code, and the rules of the director

prescribed under such sections, shall be made only from those persons whose names are certified to the appointing authority, and no employment, except as provided in such sections, shall be otherwise given in the classified service of this state or any political subdivision thereof.

All original and promotional appointments, including provisional appointments made pursuant to section 124.30 of the Revised Code, shall be for a probationary period, not less than sixty days nor more than one year, to be fixed by the rules of the director, except as provided in section 124.231 of the Revised Code, or except original appointments to a police department as a policeman or policewoman, or to a fire department as a fire fighter which shall be for a probationary period of one year, and no appointment or promotion is final until the appointee has satisfactorily served his probationary period. Service as a provisional employee in the same or similar class shall be included in the probationary period. If the service of the probationary employee is unsatisfactory, he may be removed or reduced at any time during his probationary period after completion of sixty days or one-half of his probationary period, whichever is greater. If the appointing authority's decision is to remove the appointee, his communication to the director shall indicate the reason for such decision. Dismissal or reduction may be made under provisions of section 124.34 of the Revised Code during the first sixty days or first half of the probationary period, whichever is greater. Any person appointed to a position in the classified service under sections 124.01 to 124.64 of the Revised Code, except temporary and exceptional appointments, shall be or become forthwith a resident of the state.

124.90 Waiver of laws to avoid federally prohibited discrimination

(A) Any municipal corporation may, by a two-thirds vote of its legislative authority, waive, suspend, or alter any of the provisions of this chapter as they apply to that municipal corporation if such waiver, suspension, or alteration is necessary for the municipal corporation to comply with any federal law or any rules adopted pursuant to federal law concerning discrimination in employment.

(B) Any municipal corporation that has adopted the provisions of this chapter as part of its charter may, by a two-thirds vote of its legislative authority, waive, suspend, or alter any of the provisions of this chapter so adopted if such waiver, suspension, or alteration is necessary for the municipal corporation to comply with any federal law or any rules adopted pursuant to federal law concerning discrimination in employment.

(C) A municipal corporation may not under this section make any waiver, suspension, or alteration of provisions of this chapter that relate to matters of promotions within the municipal civil service.